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No. 88-410

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNISYS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in determining that the government timely exercised its contract option to purchase additional "LORAN-D" ground chains within 120 days of accepting the first such chain.

1. a. In January 1974, the government contracted with petitioner[1] for the design, fabrication, testing, and delivery of one LORAN-D ground chain, an advanced transportable, computer controlled, solid state long-range (LORAN) navigation system (Pet. App. 2a). The contract gave the government the option to purchase as many as three additional ground chains, at specified prices (*id.* at

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[1] Prior to its November 12, 1986, merger with Burroughs Corporation, petitioner Unisys was known as Sperry Corporation. See Pet. 1 n.1.

3a). To be effective, the option had to be exercised " ' "within 120 days after final acceptance by the Government" ' " of the first chain (*ibid.* (citation omitted)).

The contract required petitioner to conduct an extensive series of tests on the equipment, including processes called Development, Test and Evaluation (DT&E); Physical Configuration Audit (PCA); Functional Configuration Audit (FCA); and Formal Qualification Review (FQR) (Pet. App. 2a-3a). The DT&E tests were completed on February 3, 1978. The FCA, FQR, and the field portion of the PCA were all completed by March 1, 1978 (*id.* at 3a). On March 18, 1978, petitioner completed refurbishing of the test site and the equipment (*ibid.*). Final government inspection took place from February 27 to March 18, 1978, and on March 20, 1978, the government executed a DDForm 250 accepting the LORAN-D chain (*ibid.*). "Execution of the DD 250 is the recognized method for acceptance in Government contracts" (*id.* at 56a).

The government exercised its option on July 6, 1978, within 120 days of March 20, 1978, the date on which it had executed the DD Form 250 accepting the first chain (Pet. App. 3a).[2] Petitioner contended, however, that the government had accepted the LORAN-D upon completion of DT&E testing on February 3, 1978, more than 120 days before July 6, 1978. It therefore asserted that the option had not been timely exercised. *Id.* at 4a. Petitioner claimed that it was entitled to an equitable price adjustment, and it supplied two additional chains under protest (*ibid.*).

b. Petitioner's claim for the adjustment was denied by the contracting officer (Pet. App. 4a). The Board thereafter denied petitioner's appeal from that ruling (*id.* at

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[2] Petitioner received the document exercising the option on July 14, 1978, 116 days after the March 20, 1978 execution of the DD Form 250 (Pet. App. 57a).

40a-76a). The Board concluded from the available evidence that the government had accepted the chain on March 20, 1978, when it executed the DD Form 250 (*id.* at 64a-72a).[3]

c. The Claims Court reversed (Pet. App. 15a-39a). The court found (*id.* at 30a) that the terms of the contract were "inconsistent" and could not "be harmonized." It therefore applied the "Order Of Precedence" provision in the contract, which designates which among the contract terms shall take precedence in the event of an inconsistency.[4] Based on that provision, the court looked to the "Inspection at origin" clause to supply the date of acceptance. That clause states: "Final inspection and acceptance upon successful completion of DT&E Field Test at destination" (*id.* at 4a). The court acknowledged that "[i]t may well be that execution of a DD250 is the generally recognized method for acceptance of an item in government contracting" (*id.* at 33a). It noted, however, that parties may "agree to another form of acceptance" (*ibid.*). Relying on the "Inspection at origin" clause, the Claims Court held that the government's acceptance of the equipment had

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[3] Board Member Gomez dissented (Pet. App. 75a-76a). In his view, the government had accepted the equipment when the DT&E tests were completed, and thus the exercise of the option was untimely.

[4] Special Provision 5 of Section J of the Contract, ORDER OF PRECEDENCE, provides (Pet. App. 5a):

> In the even[t] of an inconsistency in this contract, unless otherwise provided herein, the inconsistency shall be resolved by giving precedence in the following descending order: 1) Schedule (excluding Statement of Work, the Specifications, and Contract Data Requirements List); 2) General Provisions; 3) the other provisions of the contract whether incorporated by reference or otherwise; 4) Statement of Work; 5) Contract Data Requirements List; 6) the Specifications * * *; 7) The Contractor's Technical Proposal as described in Section F.

occurred on March 1, 1978, when the DT&E testing was completed (*id.* at 38a).[5] The Claims Court accordingly concluded that the government's exercise of the option was untimely (*id.* at 39a). After remanding for a determination of damages, the Claims Court entered final judgment against the government in an amount stipulated by the parties (*id.* at 4a).

2. The court of appeals reversed (Pet. App. 1a-12a), holding that the government had accepted the first LORAN-D chain on March 20, 1978, when it signed the DD Form 250. The court found no need to resort to the "Order of Precedence" clause, because, as the Board had noted, " 'it is possible to harmonize all contract provisions relating to * * * acceptance without creating conflicts between them or rendering some of the provisions meaningless' " (*id.* at 5a (citation omitted)). The court first held that the "Inspection at [o]rigin" clause "does not provide that completion of DT&E testing itself constituted final acceptance by the government" (*id.* at 7a). Rather, the court explained (*ibid.*) that "in this context" the word "upon" in the Inspection at origin clause is properly construed to mean "shortly afterward." Thus, the court concluded, the Inspection at origin clause does not "indicate that the parties intended in this contract to depart from the usual procedure that government acceptance would 'be evidenced by execution of an acceptance certificate on the applicable inspection and receiving report form [here DD Form 250]' " (*ibid.* (brackets in original)). The court also found (*id.* at 11a-12a) that the actions of the parties during performance of the contract confirmed that acceptance by the government required that the government execute a

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[5] The Claims Court selected March 1, 1978, rather than February 3, 1978, as the date of acceptance, because it found (Pet. App. 32a) that the FCA, FQR, and PCA tests were all part of the DT&E testing.

Form DD250. In particular, the court noted (*id.* at 12a) that in an April 20, 1978, letter to the government, petitioner had acknowledged that the chain "was formally accepted * * * on March 20, 1978," the date on which the DD250 was signed.[6]

3. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any court of appeals. Moreover, the case involves a fact-bound challenge to the construction of a particular government contract. Further review by this Court is unwarranted.

Congress designed the Federal Circuit to be the arbiter of " 'all federal contract appeals in which the United States is a defendant.' " *United States* v. *Hohri,* No. 86-510 (June 1, 1987), slip op. 7 (quoting H.R. Rep. 97-312, 97th Cong., 1st Sess. 18 (1981); H.R. Rep. 96-1300, 96th Cong., 2d Sess. 16 (1980)). In creating the Federal Circuit, Congress sought a mechanism for " 'prompt, definitive answer[s] to [contract] questions,' " where in the past the law had not been uniformly applied among the appellate courts. *United States* v. *Hohri,* slip op. 7 (quoting S. Rep. 97-275, 97th Cong., 1st Sess. 3 (1981); S. Rep. 96-304, 96th Cong., 1st Sess. 9 (1979)). Exercising the authority granted to it by Congress, the Federal Circuit concluded in this case that the various "acceptance" clauses in the contract could be harmonized. The court therefore had no need to apply the Order of Precedence provision.

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[6] Judge Bissell concurred in the result (Pet. App. 13a-14a). He explained that acceptance by the government is ordinarily evidenced by the execution of a Form DD250 (*id.* at 13a). Judge Bissell therefore urged the adoption of a "bright line" rule that "acceptance occurs only through the execution of the DD250, or similar document, unless the contract *clearly* states otherwise" (*id.* at 13a-14a (emphasis in original)). Because, in his view, the contract was "too loosely worded" to overcome that presumption, Judge Bissell concluded that acceptance occurred when the DD250 was executed (*id.* at 14a).

Petitioner contends (Pet. 9-11) otherwise, claiming that the definition of "acceptance" in the Statement of Work clause cannot be squared with the definition of "acceptance" in the Correction of Deficiencies clause. Petitioner misconstrues those provisions. The Statement of Work clause provides for acceptance following successful completion of DT&E and correction of design deficiencies; the "Correction of Deficiencies" clause requires petitioner to correct all deficiencies discovered within twelve months after acceptance. Petitioner asserts (Pet. 10) that the first clause provides for acceptance after correction of deficiencies, while the latter provides that deficiencies must be corrected after acceptance of the product. Read in context, however, the Correction of Deficiencies clause simply requires petitioner to correct those defects that were not identified prior to acceptance. The two clauses are thus completely consistent, both with each other and with the "Inspection at origin" clause.

Because the terms of the contract are capable of being harmonized, the court of appeals had no basis for construing the contract against the drafter (see Pet. 12-14), or for adopting a strict construction of the options clause (Pet. 14-18). See *United States* v. *Seckinger*, 397 U.S. 203, 210 (1970) (quoting *Gelco Builders & Burjay Const. Co.* v. *United States*, 369 F.2d 992, 999-1000 (Ct. Cl. 1966)). Indeed, there was no need to construe the options clause at all, since only the definition of the term "acceptance" was at issue, and that term appeared in several places in the contract and had a commonly accepted meaning within the industry. To determine the appropriate definition therefore required the court to construe the contract as a whole, in the light of the dealings and understandings of the parties. The court's fact-bound resolution of that issue is correct. In fact, as the court below noted (Pet. App. 12a), petitioner itself acknowledged, in a letter dated April

20, 1978, that the chain had been "formally accepted * * * on March 20, 1978," the date on which the DD250 was signed (*ibid.*). There is accordingly no merit to petitioner's prediction that the court's decision will "create[ ] turmoil" (Pet. 18) and "open the 'floodgates' to endless litigation" (Pet. 8).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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